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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDITH MACIAS, individually and on
behalf of similarly situated
individuals; HOTON DURAN;
TIFFANY HUYNH; AURA MENDIETA;
WILLIAM LABOY; MIGUEL ACOSTA;
CRUZ ACOSTA; CUAUHEMOC
TORAL; and TERESA VILLEGAS,

Plaintiffs,

vs.

THOMAS J. TOMANEK; and
MARK GARIBALDI, individually
and doing business as THE
GARIBALDI COMPANY,

Defendants.

Case No. C07-3437 JSW

PLAINTIFFS' OPPOSITION TO
DEFENDANT THOMAS J.
TOMANEK'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION

CLASS ACTION

Hearing:

Date: January 11, 2008
Time: 9:00 a.m.
Room: Courtroom of the
Hon. Jeffrey S. White

Defendant Thomas J. Tomanek has filed a motion to dismiss plaintiffs' first amended complaint for lack of subject matter jurisdiction pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. (Doc. # 20.) Defendant, correctly, states that plaintiffs have not alleged any federal claims against him, and that diversity between the parties is lacking. (Doc # 20 at 5.) However, plaintiffs' complaint against him should not be dismissed because this Court has supplemental jurisdiction of plaintiffs' claims against Tomanek pursuant to 28 U.S.C. § 1367(a).

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1 Section 1367(a) provides, in pertinent part, that in cases in which the district
2 courts have federal question jurisdiction,

3 the district courts shall have supplemental jurisdiction over all other claims
4 that are so related to claims in the action within such original jurisdiction
5 that they form part of the same case or controversy under Article III of the
United States Constitution. Such supplemental jurisdiction shall include
claims that involve the joinder or intervention of additional parties.

6 28 U.S.C. § 1367(a). If the federal and state law claims derive from a common nucleus
7 of operative fact and comprise but one constitutional case, then the district court may
8 exercise supplemental jurisdiction and hear claims involving a party over whom there is
9 no independent basis for federal court jurisdiction. See Mendoza v. Zirkle Fruit Co.,
10 301 F.3d 1163, 1173-74 (9th Cir. 2002) (where a defendant was named as an
11 association-in-fact enterprise, not a defendant, in federal RICO claim, district court has
12 discretion to exercise supplemental jurisdiction over state conspiracy claims against
13 that defendant if the state claims constitute part of the same constitutional case as the
14 federal RICO claims).

15 In this case, the claims against defendant Thomas J. Tomanek arise out of the
16 same transactions and occurrences as do the claims against co-defendant Mark
17 Garibaldi. Tomanek is named as the enterprise in the RICO allegation against
18 Garibaldi. (Doc. #19, ¶ 68.) The state law claims alleged against Tomanek arise out of
19 a common nucleus of operative fact, and are part of the same case and controversy, as
20 the RICO allegations. At this point, it would be premature to dismiss plaintiffs' claims
21 against Thomas J. Tomanek. His co-defendant Mark Garibaldi also has filed a motion
22 to dismiss plaintiffs' complaint. (Doc. 22.) Garibaldi asserts that plaintiffs have failed to
23 state a viable claim for relief under RICO. If this Court agrees with his arguments, and
24 dismisses plaintiffs' complaint, then it would be appropriate to dismiss plaintiffs' claims
25 against Tomanek. If, however, this Court denies Garibaldi's motion to dismiss, then it
26 should exercise its discretion and assert supplemental jurisdiction over plaintiffs' claims
27 against Tomanek.

28 The arguments regarding plaintiffs' failure to state a claim for under RICO

1 against Garibaldi that set forth in Tomanek's motion, at pages 5-6, are addressed in
2 plaintiffs' opposition to Garibaldi's motion to dismiss filed concurrently herewith, and will
3 not be repeated here. (See Opposition, Doc. # 27.)

4 For all of these reasons, the Court should deny defendant's motion to dismiss.

5 Dated: November 9, 2007.

6 Respectfully submitted,

7 BRANCART & BRANCART

8
9 /s/
10 Elizabeth Brancart
11 Attorneys for Plaintiffs
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PROOF OF SERVICE

I am over the age of 18 and am not a party to the within action. My business address is 8205 Pescadero Road, Loma Mar, California 94021.

On November 9, 2007, I served a true and correct copy of the following document(s):

**PLAINTIFFS' OPPOSITION TO DEFENDANT THOMAS J. TOMANEK'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION**

upon the following person(s):

Ms. Sara Allman, Allman & Nielsen, 100 Larkspur Landing Circle, Suite 212
Larkspur, CA 94939; and

Mr. John S. Blackman, Farbstein & Blackman, 411 Borel Ave., Suite 425, San
Mateo, CA 94402

	BY HAND DELIVERY: By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above.
	BY MAIL: By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Loma Mar, California, addressed as set forth above.
	BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY): By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day.
	BY FACSIMILE: By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above.
xx	BY ELECTRONIC TRANSMISSION OF THE "NOTICE OF ELECTRONIC FILING:" By electronically filing the document(s) (All counsel are "Filing Users")

I certify that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 9, 2007, at Loma Mar, California.

/s/ Elizabeth Brancart
Elizabeth Brancart